FILED
AUG - 9 2000
CLERK

(3)

No. 99-2060

IN THE

Supreme Court of the United States

WESTERN ATLAS INC.,
Petitioner,

v.

ALEX PENNINGTON AND HAROLD G. CUNNINGHAM,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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REPLY FOR PETITIONER

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REPLY FOR PETITIONER

The opposition confirms that certiorari should be granted. Once the *ad hominem* attacks launched by Respondents[1] are cast aside, as they must be, the remainder of the opposition contains nothing more than a recitation of irrelevant facts and a misunderstanding of the landscape of conflicting ERISA § 510 decisions that produced the erroneous decision in this case. The Sixth Circuit's decision in this case stands in conflict with other circuits and leaves nation-wide employers subject to differing standards in ERISA § 510 cases depending on where the employee brings suit.

ARGUMENT

I. THE CIRCUIT SPLIT IS REAL AND WARRANTS THIS COURT'S ATTENTION

The Sixth Circuit's decision created a circuit split concerning the application of the prima facie case in ERISA § 510 cases. (Pet. 7-13) Equally important, it stands for the mistaken proposition that every former employee who can show that his employer was "aware" that the employee's separation would prevent the former employee from accruing additional pension benefits establishes a prima facie case. This holding undermines the entire burden-shifting framework because virtually every plaintiff will satisfy this meaningless threshold requirement as interpreted by the Sixth Circuit.

Compounding the problems generated by this split is the fact that the federal courts have yet to reach a consensus on the basic prima facie requirements under ERISA § 510. (Pet. 13-15) Respondents wrongly contend that "[e]very circuit in this nation

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[1] The nature of these accusations is disturbing in light of Respondents' counsel's past conduct chronicled by this Court in *Cunningham v. Hamilton County, Ohio*, 527 U.S. 198 (1999).

follows the same statutory definitions for a prima facie case," and there is "zero possibility for confusion." (Opp. 2, 9) Quite the contrary, at least three different prima facie tests have emerged amongst the circuits. *Compare Dister v. Continental Group, Inc.*, 859 F.2d 1108, 1114-15 (2d Cir. 1988) (holding that plaintiff must show that he "(1) belongs to a protected group, (2) was qualified for the position, and (3) was discharged or denied employment under circumstances that give rise to an inference of discrimination"), *with Smith v. Ameritech*, 129 F.3d 857, 865 (6th Cir. 1997) (finding that plaintiff must establish "(1) prohibited employer conduct (2) taken for the purpose of interfering (3) with the attainment of any right to which the employee may become entitled"), *and Kinkead v. Southwestern Bell Tel. Co.*, 49 F.3d 454, 457 (8th Cir. 1995) ("[A] claimant must demonstrate a causal connection between the likelihood of future benefits and an adverse employment action."). Divergent applications of the prima facie tests have prompted the Seventh Circuit to acknowledge that: "Courts differ regarding the required content of a prima facie case in the ERISA context." *Little v. Cox's Supermarkets*, 71 F.3d 637, 642 (7th Cir. 1995). No uniform test has emerged for a prima facie case under ERISA § 510, and the tests that do exist frustrate the courts because of their imprecision and their neglect of the "specific intent" requirement. *Id.* at 642 n.3. [2]

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[2] The adoption of variants of the Title VII burden-shifting regime in § 510 cases is the root of the problem that resulted in the circuit split in this case. Commentators have noted that the application of this standard produces "uneven adjudication" in § 510 cases. Note, *The Road to Retirement - Paved with Good Intentions but Dotted with Potholes of Untold Liability: ERISA Section 510, Mixed Motives and Title VII*, 81 MINN. L. REV. 735, 737 (1997). As Title VII standards evolve, these shifts generate uncertainty in § 510 cases "for both the potential employee plaintiff and the potential corporate defendant." *Id.* at 738.

The circuit split on the requirements of a prima facie case has contributed to circuit splits and inconsistency concerning the application of the requirements, however defined. In the case below, the Sixth Circuit found the prima facie test satisfied when the harm alleged was a lost opportunity to accrue additional benefits. (Pet. App. 16a-19a) The Sixth Circuit's endorsement of the lost opportunity argument was premised on its conclusion that the employer "was aware" of the lost opportunity and that the adverse action was sufficiently proximate to the payout or valuation date to infer unlawful interference. (Pet. App. 16a-19a) Such a standard effectively eviscerates the prima facie test because the hollow prima facie requirements announced by the Sixth Circuit will be satisfied by almost every plaintiff. For that reason, some circuits have expressly rejected the position adopted by the Sixth Circuit.[3] (Pet. 8 and cases cited therein) Following this lead, various district courts have gone so far as to conclude that vested plaintiffs cannot state a cause of action under ERISA § 510 for the lost opportunity to accrue additional benefits. *See, e.g., Rogic v. Mallinckrodt Med., Inc.*, 917 F. Supp. 671, 681 (E.D. Mo. 1996); *Malone v. Gilman Paper Co.*, 737 F. Supp. 88, 89-90 (S.D. Ga. 1990)

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[3] Indeed, the Sixth Circuit distanced itself from the decisions of other circuits when it criticized Petitioner for a citation issue. (Pet. App. 17a-18a) In its brief to the Sixth Circuit, Petitioner cited a portion of *Clark v. Resistoflex Co.*, 854 F.2d 762, 771 (5th Cir. 1988), where the Fifth Circuit concluded that: "where the only evidence that an employer specifically intended to violate ERISA is the employee's lost opportunity to accrue additional benefits, the employee has not put forth evidence sufficient to separate that intent from the myriad of other possible reasons for which an employer might have discharged him." The Sixth Circuit in *Rush v. United Technologies*, 930 F.3d 453, 457 (6th Cir. 1991) quoted *Clark* at length, including the very quotation cited by Petitioner. Petitioner regrettably cited that portion of *Rush* without giving additional attribution to *Clark*—which, however, until this case, was the law in the Sixth Circuit. The Sixth Circuit's emphasis on this citation demonstrates that the Sixth Circuit has retreated from its prior position which aligned itself with the Fifth Circuit's reasoning in *Clark*.

("[T]he court's own research has revealed a long line of cases holding that an employee whose pension rights are vested at the time of his termination cannot invoke the protections of § 510."); *Corum v. Farm Credit Servs.*, 628 F. Supp. 707, 717-718 (D. Minn. 1986).[4]

Petitioner respectfully submits that this Court should intervene and clarify the prima facie standard in order to achieve uniformity in ERISA § 510 cases. Respondents' efforts to distinguish cases cited by Petitioner do not obscure the fact that the Sixth Circuit's decision stands at odds with its sister circuits. For example, in *Turner v. Schering-Plough Corp.*, 901 F.2d 335 (3d Cir. 1990), the Third Circuit faced a situation very similar to the one below. The plaintiff's termination meant that he would receive approximately half of the pension benefits that he would have received had he been able to work for two and half more years, and the employer was aware of this effect on plaintiff's pension benefits. *Id.* at 340. Despite this showing, the Third Circuit held that plaintiff failed to satisfy his prima facie burden because the lost opportunity to accrue additional benefits "occurs whenever an ERISA employer discharges an employee and is not alone probative of an intent to interfere with pension rights." *Id.* at 348. The Third Circuit found no prima facie case despite the lost opportunity to accrue additional benefits, the employer's awareness of the effect of the adverse action, and a closer proximity than that established by Respondents.

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[4] The Fourth Circuit has expressly rejected this position. *Conkwright v. Westinghouse Elec. Corp.*, 933 F.2d 231, 236-38 (4th Cir. 1991). A similar argument was advanced in *Inter-Modal Rail Employees Ass'n v. Atchison, Topeka & Santa Fe Ry. Co.*, 520 U.S. 510 (1997), where the employer argued that § 510, when applied to welfare benefits, only protects an employee's right to cross the "threshold of eligibility." *Id.* at 516. This Court, however, declined to address the merits of this position; rather, it remanded this issue to the Ninth Circuit. *Id.* at 517.

Furthermore, the other circuits recognize that general awareness of the effect of adverse action on benefits is insufficient to sustain a prima facie case, *Kinkead*, 49 F.3d at 457, or to establish discriminatory intent. *Lehman v. Prudential Ins. Co. of America*, 74 F.3d 323, 331 (1st Cir. 1996). Courts in other circuits likewise have rejected the proximity argument embraced by the Sixth Circuit. *See, e.g., Clark v. Coats & Clark, Inc.*, 990 F.2d 1217, 1224-26 (11th Cir. 1993); *DeWitt v. Penn-Del Directory Corp.*, 106 F.3d 514, 523-24 (3d Cir. 1997); *Shores v. Lucent Technologies, Inc.*, 203 F.3d 822 (4th Cir. 2000) (table); *Rogic v. Mallinckrodt Med., Inc.*, 917 F. Supp. 671, 680-81 (E.D. Mo. 1996). The tension between these cases and the Sixth Circuit's decision engenders significant uncertainty for parties bringing or defending § 510 claims. Although Respondents label this circuit split as "artificial," the result below simply cannot be squared with the weight of authority from the other circuits.

These divergent interpretations have prompted some district courts to recognize that "[t]here is a split of authority" on the issue of whether a fully vested participant can state a claim under § 510, *Humes v. McDonnell Douglas Corp.*, 922 F. Supp. 229, 233 n.2 (E.D. Mo. 1996) (collecting cases), and that "[t]he issue poses a difficult question of statutory interpretation upon which several courts have reached different conclusions." *Heath v. Massey-Ferguson Parts Co.*, 869 F. Supp. 1379, 1384 (E.D. Wis. 1994), *rev'd*, 71 F.3d 256 (7th Cir. 1995). The federal courts have addressed the lost opportunity problem in at least three different ways, which means that the fate of the claims brought by Pennington and Cunningham depended on the forum in which they initiated the litigation. Within the Eighth Circuit and in various districts throughout the country, their claims would have been dismissed under FED. R. CIV. P. 12(b)(6). *Humes*, 922 F. Supp. at 233 n.2 ("Several district courts within this circuit have held that 'the language of § 510 precludes a cause of action by a plaintiff already fully vested in the pension

plan.' "). In the Second, Third, Fifth, and Eleventh Circuits, a court likely would have concluded that their claims did not satisfy the prima facie test at the summary judgment stage. (Pet. 8) Under the Sixth Circuit's approach, however, their claims satisfied the prima facie standard.

II. THE FACTUAL ISSUES RAISED BY RESPONDENTS WERE NOT CONSIDERED BY THE SIXTH CIRCUIT IN REACHING ITS PRIMA FACIE CASE DECISION

Respondents' accusation that Petitioner misled this Court by omitting certain facts from its petition ignores a critical point: the Sixth Circuit did not rely on any of the "facts" cited by Respondents in order to support its finding of a prima facie case.[5] The Sixth Circuit held that Respondent established a prima facie case through evidence of the proximity of the discharges to retirement age and based on Petitioner's awareness of the effects on their pension benefits. (Pet. App. 17a-18a) The court gleaned this awareness from three specific findings of fact issued by the district judge, which it recited in full. (Pet. App. 19a) Petitioner adequately discussed these facts in its petition, (Pet. 3-6, 9-10), and thus this Court should disregard Respondents' attempt to divert attention from the legal issues that generated the circuit split.

Like the Sixth Circuit, Respondents cite no evidence that the reduction-in-force of which Respondents fell afoul was motivated by a specific intent to interfere with *pension* rights. (Opp. 2-8) Respondents introduced virtually no evidence in the record

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[5] Furthermore, the Sixth Circuit was aware of these facts as evidenced by Respondents' citations to the opinion. The court's decision not to consider these facts at the prima facie stage reflects its proper conclusion that they shed no light on the prima facie requirements or on Petitioner's motivations.

of pension interference. The facts stressed by Respondents in their Opposition confirm this. First, Respondents rely principally on the testimony of one of Petitioner's managers, who testified that the company sought to reduce salaries and *medical* costs. (Opp. 5-6 n.2) A desire to reduce salaries and *medical* costs fails to advance a claim for *pension* interference. Likewise, Respondents cling to the litigation risk analysis performed by Western. (Opp. 5, 7) Of note, this analysis classified employees by age, disability, medical histories, and exemption status, but it did not assess the pension variable. In short, Respondents cite no evidence of a desire to interfere with their pension benefits; their attempt to equate medical costs (which were not part of their claims) with pension rights (which were) had the effect of confusing the court and led the Sixth Circuit to conclude erroneously that they satisfied the prima facie test of pension interference. (Pet. 9-11) This decision stands in part for the proposition that employers who seek to reduce costs in general may be held liable under ERISA § 510 without a showing of causation between the adverse action and pension benefits.

III. THE ISSUES PRESENTED ARE IMPORTANT AND RECURRING

Not surprisingly, Respondents make no effort to dispute either the importance or the impact of the Sixth Circuit's decision below. The decision poses a serious threat, particularly in the reduction-in-force context, because it allows employees to satisfy the prima facie case simply by showing a lost opportunity to accrue additional benefits. Other circuits have rejected this theory because it ignores the distinction between losing the opportunity to accrue additional benefits as a mere consequence of termination and losing this opportunity as a motivating factor behind the termination. *See, e.g., Dister*, 859 F.2d at 1111. Without Supreme Court intervention to resolve the conflict below, nationwide employers will continue to be subject to differ-

ent standards of liability in the different parts of the country in which they operate.

Petitioner's counsel has already been contacted by other attorneys who represent employers being sued by plaintiffs relying on the Sixth Circuit decision below. This decision can and will be wielded by plaintiffs who have no evidence of pension interference, but who believe that they can survive summary judgment on the strength of the Sixth Circuit's pronouncement. Unfortunately, the Sixth Circuit's decision cannot be brushed aside as an aberrational result because it reflects genuine confusion in an area which this Court has not addressed. The circuit conflict is real, is worsening, and is now ripe for resolution in this Court.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the petition, Petitioner respectfully submits that certiorari should be granted.

Respectfully submitted,

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